IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 37932

KENNETH EDWARD ELCOCK,	)	**2011 Unpublished Opinion No. 655**
Petitioner-Appellant,	)	**Filed: October 7, 2011**
v.	)	**Stephen W. Kenyon, Clerk**
STATE OF IDAHO,	)	**THIS IS AN UNPUBLISHED OPINION AND SHALL NOT BE CITED AS AUTHORITY**
Respondent.	)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Deborah A. Bail, District Judge.

Order summarily dismissing petition for post-conviction relief, affirmed.

Kenneth E. Elcock, Boise, pro se appellant.

Hon. Lawrence G. Wasden, Attorney General; Lori A. Fleming, Deputy Attorney General, Boise, for respondent.

GUTIERREZ, Judge

Kenneth Edward Elcock appeals from the order of the district court summarily dismissing his petition for post-conviction relief. We affirm.

I.
FACTUAL AND PROCEDURAL BACKGROUND

Kenneth Edward Elcock was arrested following a shooting that wounded several people and killed a fourteen-year-old girl. Before trial, Elcock underwent a competency evaluation during which his attorney was not present. Elcock was found competent to stand trial and subsequently pled guilty to second degree murder, Idaho Code §§ 18-4001, 18-4002, 18-4003(g); aggravated assault, I.C. §§ 18-901(a) 18-905; and three counts of aggravated battery, I.C. §§ 18-903(c), 18-907. Before sentencing, Elcock participated in a presentence investigation interview during which his attorney was not present.

The district court imposed an aggregate unified life sentence, with forty years determinate. Thereafter, Elcock filed a pro se petition for post-conviction relief, twice amended

with permission of the court, asserting a variety of claims. The State responded by filing a motion for summary dismissal. The district court granted the State's motion and dismissed Elcock's petition. Elcock appeals, contending summary dismissal was improper because he raised genuine issues of material fact.

II.
STANDARD OF REVIEW

An application for post-conviction relief initiates a civil, rather than criminal, proceeding, governed by the Idaho Rules of Civil Procedure. *State v. Yakovac*, 145 Idaho 437, 443, 180 P.3d 476, 482 (2008). *See also Pizzuto v. State*, 146 Idaho 720, 724, 202 P.3d 642, 646 (2008). Like the plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; *Stuart v. State*, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990); *Goodwin v. State*, 138 Idaho 269, 271, 61 P.3d 626, 628 (Ct. App. 2002). An application for post-conviction relief differs from a complaint in an ordinary civil action. *Dunlap v. State*, 141 Idaho 50, 56, 106 P.3d 376, 382 (2004). The application must contain much more than "a short and plain statement of the claim" that would suffice for a complaint under Idaho Rule of Civil Procedure 8(a)(1). *State v. Payne*, 146 Idaho 548, 560, 199 P.3d 123, 135 (2008); *Goodwin*, 138 Idaho at 271, 61 P.3d at 628.

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief, either pursuant to motion of a party or upon the court's own initiative. Summary dismissal of an application is the procedural equivalent of summary judgment under Idaho Rule of Civil Procedure 56. A claim for post-conviction relief will be subject to summary dismissal if the applicant has not presented evidence making a prima facie case as to each essential element of the claims upon which the applicant bears the burden of proof. *DeRushé v. State*, 146 Idaho 599, 603, 200 P.3d 1148, 1152 (2009). Thus, summary dismissal is permissible when the applicant's evidence has raised no genuine issue of material fact that, if resolved in the applicant's favor, would entitle the applicant to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted. *Payne*, 146 Idaho at 561, 199 P.3d at 136; *Goodwin*, 138 Idaho at 272, 61 P.3d at 629. Summary dismissal of an application for post-conviction relief may be appropriate, however, even where the State does not controvert the applicant's evidence because the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of

law. *Payne*, 146 Idaho at 561, 199 P.3d at 136; *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994).

When reviewing a district court's order of summary dismissal in a post-conviction relief proceeding, we apply the same standard as that applied by the district court. *Ridgley v. State*, 148 Idaho 671, 675, 227 P.3d 925, 929 (2010). On review of dismissal of a post-conviction relief application without an evidentiary hearing, we determine whether a genuine issue of material fact exists based on the pleadings, depositions, and admissions together with any affidavits on file. *Rhoades v. State*, 148 Idaho 247, 250, 220 P.3d 1066, 1069 (2009); *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993).

III.
ANALYSIS

Elcock argues the district court erred in dismissing his petition for post-conviction relief because material issues of fact existed as to whether: (1) there was a factual basis for his second degree murder and aggravated battery convictions; (2) he received ineffective assistance of counsel because counsel had a conflict of interest and failed to attend Elcock's presentence interview and competency evaluation; (3) his guilty plea was invalid because he was depressed and taking medications when it was entered; (4) he was deprived of due process and equal protection when he was convicted of second degree murder without having an "intent to kill"; (5) the district court falsely labeled him as a gang member during sentencing; and (6) he suffered discrimination and "racial profiling." We address each in turn.[1]

A. Guilty Plea

In his post-conviction petition, Elcock asserted several reasons as to why his guilty plea was not valid, all of which were summarily dismissed by the district court. On appeal, he contends that such dismissal was erroneous because there existed genuine issues of material fact sufficient to survive summary dismissal.

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[1] In his reply brief to this Court, Elcock raises for the first time an issue entitled "Right to legal assistance." We will not however, address the merits of a claim raised for the first time in a reply brief. *Monahan v. State*, 145 Idaho 872, 877, 187 P.3d 1247, 1252 (Ct. App. 2008).

1. Factual basis

First, Elcock contends there was not a factual basis to support a "conviction" for second degree murder or aggravated battery because he had not intended to harm anyone--which the district court interpreted as a contention there was not a factual basis for entry of his guilty plea.[2] In Idaho, there is no general obligation to inquire into the factual basis of a guilty plea. *State v. Ramirez*, 122 Idaho 830, 834, 839 P.2d 1244, 1248 (Ct. App. 1992). However, such an inquiry should be made if an *Alford*[3] plea is accepted, or if the court receives information before sentencing which raises an obvious doubt as to guilt. *Id*. The record is clear that Elcock did not enter an *Alford* plea;[4] however, even assuming without deciding that the latter condition applied, Elcock is mistaken in his assertion that there was not a factual basis for his guilty plea.

In regard to the murder conviction, as the district court pointed out in its notice of intent to dismiss, the Idaho Supreme Court has explicitly held the *deliberate intent to kill* is not a necessary element of second degree murder. *State v. Porter*, 142 Idaho 371, 374, 128 P.3d 908, 911 (2005). Rather, the only mental element required is "malice"--which can be either express or implied. *Id*. The Court then approved of Idaho Criminal Jury Instruction 703[5] which states, in relevant part:

> Malice is implied when:
> 1. The killing resulted from an intentional act,
> 2. The natural consequences of the act are dangerous to human life, and

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[2] It is clear this assertion also encompasses Elcock's post-conviction assertion that he was denied due process because the court accepted a guilty plea without a factual basis. Thus, resolution of this issue also resolves that issue.

To the extent that Elcock also attempts to frame this as an ineffective assistance of counsel issue, because counsel allowed him to plead guilty without a factual basis, his claim has no merit. As we indicate below, an element of ineffective assistance is that counsel rendered deficient performance. Where we have found there was a factual basis in this instance, we also conclude counsel's performance could not have been deficient in this regard.

[3] An *Alford* plea is a means by which an individual may plead guilty to a crime while not admitting guilt but acknowledging the State possesses sufficient evidence to support a conviction if the defendant were to go to trial. *See North Carolina v. Alford*, 400 U.S. 25 (1970).

[4] Elcock answered no when asked at the plea entry hearing whether he was pleading guilty even though he thought he was innocent.

[5] Currently Idaho Criminal Jury Instruction 702.

> 3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.
>
> When it is shown that a killing resulted from the intentional doing of an act with express or implied malice, no other mental state need be shown to establish the mental state of malice aforethought. The mental state constituting malice aforethought does not necessarily require any ill will or hatred of the person killed.

Porter, 142 Idaho at 375, 128 P.3d at 912.

Pertaining to this case, Elcock admitted at the plea hearing that he shot the gun through the window of a crowded room where he knew a party was occurring in an effort to "scare people" and that he knew he may shoot someone by doing so. Thus, Elcock's own statements are sufficient to support a finding of implied malice: (1) he intentionally shot through the window; (2) a natural consequence of shooting into a room full of people is that people may be injured and/or killed; and (3) he had knowledge it was dangerous to human life because he knew that he may shoot someone, but disregarded that knowledge by performing the act anyway. The district court concluded, and we agree, that this was sufficient factual basis to satisfy the elements of implied malice.

Similarly, Elcock's argument fails in regard to his conviction for aggravated battery by "[u]nlawfully and intentionally causing bodily harm to an individual." I.C. § 18-903(c). In *State v. Billings*, 137 Idaho 827, 54 P.3d 470 (Ct. App. 2002), we explained that a conviction for a violation of Idaho Code § 18-903(c) requires proof that the defendant possessed intent to cause bodily harm to a person. *Id*. at 830, 54 P.3d at 473. We conclude there was a factual basis for such a finding in this case. As noted above, Elcock admitted that he intentionally shot through the window of a crowded residence where he could see people inside--facts from which a jury could readily (and reasonably) infer that he intended to shoot someone inside. That Elcock now asserts he did not intend to hurt anyone, does not show the absence of a factual basis for his plea. Accordingly, we conclude the district court did not err in summarily dismissing Elcock's claims that there was not a factual basis for his guilty plea.

2. Voluntariness

Elcock also argues the district court erred in summarily dismissing his claim that his guilty plea was invalid because he was under the influence of psychotropic medications and suffering from depression at the time he entered the plea. Before a trial court accepts a plea of guilty in a felony case, the record must show the plea has been made knowingly, intelligently and

voluntarily, and the validity of a plea is to be determined by considering all the relevant circumstances surrounding the plea as contained in the record. *Ramirez*, 122 Idaho at 833-34, 839 P.2d at 1247-48. Whether a plea is entered voluntarily and knowingly is determined by a three-part inquiry: (1) whether the defendant's plea was voluntary in the sense that he understood the nature of the charges and was not coerced; (2) whether the defendant knowingly and intelligently waived his rights to a jury trial, to confront his accusers, and to refrain from incriminating himself; and (3) whether the defendant understood the consequences of pleading guilty. *Id*. at 834, 839 P.2d at 1248.

In summarily dismissing this issue, the district court noted the court accepting the plea had specifically inquired as to the effects of the medications Elcock was taking and concluded Elcock was able to coherently respond to the questions and specifically state that the drugs were not affecting his ability to think or act. Therefore, the district court concluded there was no indication in the record that the medications he was taking had rendered his plea involuntary.

After reviewing Elcock's numerous filings below, we conclude the district court did not err in summarily dismissing this claim. As we indicated above, mere conclusory allegations without supporting facts, do not afford a petitioner an evidentiary hearing. *Payne*, 146 Idaho at 561, 199 P.3d at 136. In this instance, the most that Elcock presented to the district court was assertions that he was suffering from a "deep depression" and under the influence of "strong and mind altering serious psychotropic medications" and that at the time of his guilty plea, side effects of his condition and medications took away his vision for "some time," confused him, and impaired his judgment. However, he did not provide any evidence supporting these assertions--including, for example, what medications he was actually taking and their medically proven specific effects on him at the time of his guilty plea. Quite simply, his isolated assertion that he was suffering from depression and taking psychotropic medications at the time he entered his plea is insufficient to survive summary dismissal. *See Ricca*, 124 Idaho at 897, 865 P.2d at 988 (holding that the petitioner had not established a genuine issue of material fact as to his claim that his plea was involuntary due to the medication he was taking at the time because he had failed to allege facts describing the effect of the medication on him personally, did not include competent medical evidence that he was affected by the medication, and did not identify the difficulties he allegedly suffered on the day he entered his plea that were attributable to the medication). *Cf. West v. State*, 123 Idaho 250, 252, 846 P.2d 252, 254 (Ct. App. 1993)

(concluding that petitioner had raised a genuine issue of material fact as to the voluntariness of his guilty plea when he was taking medication because he had supported his assertions with his presentence interview and psychological evaluation which described and supported his assertions that he was taking medication and had been diagnosed with certain mental disorders).[6] Accordingly, we affirm the district court's summary dismissal of Elcock's post-conviction petition on this issue.

B. Ineffective Assistance of Counsel

Elcock contends he received ineffective assistance of counsel because his attorney had a conflict of interest and was absent during his presentence interview and competency evaluation. To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient and that the defendant was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995). To establish a deficiency, the applicant has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988).

1. Conflict of interest

While Elcock lists this issue on appeal, he does not address the nature of the alleged conflict of interest in his briefing. However, in its summary dismissal order the district court stated Elcock alleged a conflict of interest based on a letter written to Elcock by trial counsel well after Elcock pleaded guilty, where counsel stated "I never would let you plead guilty to an offense I didn't think you were guilty of." The district court concluded that this statement does not constitute deficient performance by counsel, but rather that counsel recognized his duty to "make sure that his client's guilty plea was proper."

We agree with the district court--Elcock has cited no authority for the proposition that such a statement, which apparently Elcock takes issue with because it indicated counsel's belief that he was guilty, evidences a conflict of interest. A party waives an issue on appeal if either authority or argument is lacking. *State v. Zichko*, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996). Thus, we affirm the district court's summary dismissal of this claim.

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[6] As we discuss in more detail below, neither the presentence investigation report, nor mental evaluation is included in the record on appeal.

2. Absence at presentence investigation interview and competency evaluation

Elcock also contends that his trial counsel's failure to attend his presentence investigation interview and "psychological" evaluation amounted to ineffective assistance. The Sixth Amendment provides a criminal defendant the right to counsel during the critical stages of adversarial proceedings. *United States v. Wade*, 388 U.S. 218, 224 (1967); *Estrada v. State*, 143 Idaho 558, 562, 149 P.3d 833, 837 (2006). If the stage is not critical, there can be no constitutional violation, no matter how deficient counsel's performance. *United States v. Benlian*, 63 F.3d 824, 827 (9th Cir. 1995). *See also Estrada*, 143 Idaho at 562, 149 P.3d at 837.

Pertaining to Elcock's presentence interview claim, we have held that a routine presentence interview is not a critical stage that affords a right to assistance of counsel in a noncapital case. *Stuart v. State*, 145 Idaho 467, 471, 180 P.3d 506, 510 (Ct. App. 2007). Elcock's case did not involve a capital offense and there is no argument that the presentence interview was beyond routine. Therefore, Elcock had no right to counsel's presence during the presentence interview, and counsel's absence did not amount to deficient performance.

In regard to counsel's failure to be present at the "psychological" evaluation, as a preliminary matter we note that Elcock provides very little information about this evaluation. His brief simply refers to a "psychological evaluation" and does not specify the evaluation's purpose, time of occurrence, or who conducted it. The record, however, indicates Elcock underwent a pretrial competency evaluation conducted by his own expert and since this is the only psychological evaluation referenced in the record, we assume it is the one at issue.

Elcock cites no authority, and our research has revealed none, identifying a right to counsel's presence during a pretrial competency evaluation conducted by a defendant's own expert. There is, however, significant authority addressing the right to counsel in the context of a psychosexual evaluation. Given the lack of precedent on point, it is useful to examine the authority dealing with both competency and psychosexual evaluations.

A competency evaluation usually occurs before a determination of guilt and is designed to assess a defendant's mental capacity to stand trial and seek treatment. Idaho Code § 18-211(1) provides a general overview of the procedure:

> Whenever there is reason to doubt the defendant's fitness to proceed as set forth in section 18-210, Idaho Code, the court shall appoint at least one (1) qualified psychiatrist or licensed psychologist or shall request the director of the department of health and welfare to designate at least one (1) qualified

> psychiatrist or licensed psychologist to examine and report upon the mental condition of the defendant to assist counsel with defense or understand the proceedings. The appointed examiner shall also evaluate whether the defendant lacks capacity to make informed decisions about treatment.

Idaho Code § 18-211(5) lists the specific contents of a competency evaluation report:

> Upon completion of the examination a report shall be submitted to the court and shall include the following:
> (a) a description of the nature of the examination;
> (b) a diagnosis or evaluation of the mental condition of the defendant;
> (c) an opinion as to the defendant's capacity to understand the proceedings against him and to assist in his own defense;
> (d) an opinion whether the defendant lacks the capacity to make informed decisions about treatment. "Lack of capacity to make informed decisions about treatment" means the defendant's inability, by reason of his mental condition, to achieve rudimentary understanding of the purpose, nature, and possible significant risks and benefits of treatment, after conscientious efforts at explanation.

These provisions indicate that a competency evaluation serves largely to determine a defendant's mental capacity to participate at trial and make informed decisions, requiring a report on the defendant's ability to assist defense counsel, understand court proceedings, and seek proper treatment. There are not, however, any specific requirements to assess a defendant's deviant behavior or future dangerousness. Also, statements made during a competency evaluation generally may not be considered at sentencing or introduced at trial to show guilt,[7] I.C. § 18-215; *State v. Jockumsen*, 148 Idaho 817, 820, 229 P.3d 1179, 1182 (Ct. App. 2010) (citing *Estelle v. Smith*, 451 U.S. 454, 469 (1981)); although, a defendant may choose to introduce the evaluation at trial and at sentencing to show mitigating circumstances. *Jockumsen,* 148 Idaho at 820, 229 P.3d at 1182.

By contrast, a psychosexual evaluation (PSE) is considered at sentencing and usually occurs following a determination of guilt for certain sex offenses. I.C. §§ 18-8316, 18-8304. Specifically, it "addresses sexual development, sexual deviancy, sexual history and risk of reoffense as part of a comprehensive evaluation of an offender." I.C. § 18-8303(13). The Idaho

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[7] Statements may be used to impeach a witness or to demonstrate a defendant's ability to form a specific level of intent. I.C. § 18-215.

Supreme Court noted that the nature of the information sought in a PSE increases the likelihood a defendant will reveal incriminating information. *Estrada*, 143 Idaho at 562, 149 P.3d at 837. Because of this enhanced risk, the Court held a defendant has a Sixth Amendment right to counsel's advice before submitting to a PSE. *Id*. However, this Court subsequently held there is no right to counsel's presence during an actual PSE interview because the right to counsel's advice beforehand provides sufficient Sixth Amendment protection. *Hughes v. State*, 148 Idaho 448, 456-57, 224 P.3d 515, 523-24 (Ct. App. 2009).

It is evident that the primary reason for the level of Sixth Amendment protection in a PSE stems from the greater risk of self-incrimination. That risk is presumably lower in a competency evaluation because a defendant's statements, even if incriminating, generally may not be used against the defendant at trial or sentencing. There is also no specific emphasis on assessing a defendant's deviant behavior or future dangerousness inherent in a competency evaluation. Furthermore, a defendant is still presumed innocent during a competency evaluation that occurs before a determination of guilt. I.C. § 19-2104. Thus, we conclude a defendant has no more right to counsel's presence during a competency evaluation than during a PSE. Accordingly, Elcock had no right to counsel's presence at his competency evaluation and cannot show that his attorney's absence constituted deficient performance.[8] The district court did not err in summarily dismissing Elcock's claims that his counsel was ineffective for failing to be present at his presentence investigation interview and competency evaluation.

C. False Labeling as a Gang Member

Elcock contends the district court falsely labeled him as a gang member. We have reviewed the record and find no support for this allegation. At sentencing, the trial court stated:

> It is of considerable concern to this court that the defendant has surrounded himself with so many people who are described as being in the process of becoming gang members, and I do think that its effect is worthy of consideration, that although the defendant appears to be associated with the gang, Gangster Disciples, the gang people . . . *do not say he is a documented member of that gang*, but it is of concern that there are threads throughout this file of -- this sort

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[8] We also note Elcock could not show that he was prejudiced by his attorney's absence because the district court expressly stated that it did not rely on the competency evaluation when imposing sentence.

> of disregard for human life that other areas in our state are experiencing as a result of increased gang presence, and it's certainly something . . . that is of concern.

(Emphasis added.) The court went on to explain:

> [I]t is absolutely essential that the court send a message to people who want to engage in gang-type behavior, *whether they are members of gangs or not*, that Boise will not be a friendly place for you.

(Emphasis added.) These excerpts show the trial court acknowledged Elcock associated with gang members and engaged in gang-type behavior. The trial court did not, however, expressly label him as a gang member. Thus, we conclude the district court did not err in summarily dismissing this claim.

D. Racial Discrimination

Elcock asserts he experienced racial discrimination because he is black, pointing to the presentence investigator's note that she was "disturbed" by his use of slang. However, it is the responsibility of the appellant to provide a sufficient record to substantiate his or her claims on appeal, *State v. Murinko*, 108 Idaho 872, 873, 702 P.2d 910, 911 (Ct. App. 1985), and in the absence of an adequate record on appeal to support the appellant's claims, we will not presume error, *State v. Beason*, 119 Idaho 103, 105, 803 P.2d 1009, 1011 (Ct. App. 1991). Elcock has failed to include a copy of the presentence report in the record; thus, we cannot review the issue. Accordingly, we affirm the district court's summary dismissal of this claim.

IV.

CONCLUSION

We conclude Elcock has failed to show a genuine issue of material fact as to any of his claims for post-conviction relief. Therefore, the order of the district court summarily dismissing Elcock's petition for post-conviction relief is affirmed.

Judge LANSING and Judge MELANSON **CONCUR.**